

The Administrative Law Judge found the evidence failed to establish claimant acquired an allergy to nuts, nut products or peanuts as a result of her workplace exposure while working for respondent. He found claimant failed to sustain her burden of proof that she suffered personal injury by accident arising out of and in the course of her employment. In this decision, the ALJ informed respondent that it could seek reimbursement from the Workers Compensation Fund for the \$2,801.96 in medical benefits it had paid to or on claimant's behalf, upon proper application to the Director.

Claimant argues that the ALJ erred in finding that she failed to prove she met with personal injury by accident arising out of and in the course of her employment with respondent and denied benefits. Claimant contends that she did meet with personal injury by accident arising out of and in the course of her employment with respondent and she should be awarded a 5 percent permanent partial functional impairment to the body as a whole, based on the 4th edition of the AMA *Guides*¹, and is entitled to a 72 percent permanent partial general (work) disability (100% wage loss and 44% task loss).

Respondent argues that the ALJ's Award should be affirmed and claimant denied compensation.

The issue is whether claimant met with personal injury by accident arising out of and in the course of her employment with respondent.

FINDINGS OF FACT

Claimant worked for respondent as a cook and service worker for four and a half years. She denies having any food or nut allergies before going to work for respondent. Claimant alleges that in the course of her employment with respondent she developed a nut allergy. The first time claimant had symptoms was after she was sprayed in the face with metrin oil, which is used on the belts so the candy doesn't stick. Peanut oil is also used on the belts to keep the candy from sticking. Claimant testified that when she was sprayed in the face respondent had been using a combination of metrin oil and peanut oil. After she was sprayed in the face, claimant had a reaction, becoming light headed and dizzy, she developed a headache and had burning in her eyes, mouth and nose.

After the incident, claimant went to the eye wash station, washed her face and then went to first aid to report the spraying incident. Claimant was given Benadryl, which helped a little and she went home early. Claimant returned to work the next day and each time she worked with or around nuts she would have physical symptoms of lightheadedness, dizziness, a rash on her arms and back and a headache. Over time, she began to develop nausea and sometimes would vomit. Claimant believes that she actually threw up at the plant at least 30 to 40 times. Claimant was asked to identify when she first started having a problem and she stated "within days" of being sprayed.² She identified the date as being around 2007, with her symptoms progressing until her last day of exposure on December 8, 2008.³

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

² P.H. Trans. at 15.

³ P.H. Trans. at 16.

Every time claimant had a reaction she was told to quickly leave the floor so she would not get sick around the product. She was also given Benadryl for the rash. Claimant's family physician Dr. Sloyer, prescribed an EpiPen for claimant to use in the event of a reaction. Respondent told claimant she could not carry the EpiPen on her person at work. It had to stay in her lunch box in the lunch room.

Board certified family practitioner Amy Madril, M.D. Ph.D., works as a self-employed family physician at Ashley Clinic in Chanute, Kansas. Dr. Madril testified that she first saw claimant for nonwork-related abdominal pain on October 28, 2008.

After October 2008, Dr. Madril was asked to refer claimant to an allergist because of a nut allergy. This request came as the result of a telephone call to the doctor's office from an unidentified person. After that phone call, claimant was referred to Michael P. Baker, M.D., a board certified ear, nose and throat specialist.

Dr. Madril next saw claimant on December 11, 2009. At that time, claimant had undergone a hypersensitivity test consisting of the application of two circles, one a control circle, the other involving metrin, the substance sprayed into claimant's face at work which claimant claims led to the initial reaction. Dr. Madril was asked to follow and record claimant's progress after she was tested for an adverse reaction to metrin oil. There was no obvious skin reaction noted. Claimant did complain of itching and irritation, but no current hypersensitivity reaction was noted by Dr. Madril.⁴ Claimant returned to Dr. Madril on December 14, 2009, for a follow-up examination. Claimant continued to complain of weakness, general malaise, vomiting over the weekend and headache. However, claimant's skin again was described as normal, showing no evidence of reaction to the hypersensitivity testing. Dr. Madril's diagnosis of claimant's allergic reaction was based upon claimant's subjective complaints, with no objective findings noted during the examination.

Dr. Baker testified that claimant was first referred to him on December 2, 2008. Dr. Baker is not board certified as an allergist or immunologist. He took a history from claimant which included her describing an allergic reaction when exposed to metrin oil, peanut oil and nuts in the course of her employment with respondent. Dr. Baker did not know what metrin oil was and was not given a sample for testing. He had no information about how claimant was exposed or the extent or duration of that exposure. Claimant displayed no signs of an allergic reaction at the time of this visit.

Dr. Baker testified that he has not found any medical records dealing with claimant documenting that she was having an active allergic reaction. Claimant reported that she had an allergy to the raw nuts, but didn't seem to have a problem with the product when it was wrapped. Claimant was tested for an allergy to the six most common foods: milk,

⁴ Madril Depo., Cl. Ex. 1.

eggs, wheat, soy, corn and peanuts. The RAST test was negative for milk, wheat, corn, peanut, soybean and eggs. However, she still had a past history consistent with an allergy. Dr. Baker determined, by history, that claimant had recurrent angioedema and a probable peanut or nut allergy. He recommended claimant carry an EpiPen and avoid peanut products. It was Dr. Baker's opinion, based upon claimant's history, that claimant was one of those people who is genetically predisposed or susceptible to developing an allergy due to overexposure to peanuts. However, he agreed that there are a variety of environmental factors, not all work-related, which could cause someone to develop a nut allergy.

Dr. Baker received a note from respondent that indicated there was no way claimant would be able to avoid contact with nuts in any form despite wearing a protective mask and gloves. Dr. Baker opined that claimant's peanut allergy was caused by her exposure to nuts at Russell Stover each and every working day ending on her last day of employment on December 8, 2008. He had no explanation for why claimant developed this peanut allergy. After claimant's results from Dr. Baker's tests were submitted to respondent, her employment was terminated because there was no position available that did not involve exposure to nuts.

Claimant's symptoms progressed from 2007 up until her last day of exposure on December 8, 2008. She has not worked since she was terminated in December 2008, but she does feel that she can work and has looked for work. She testified that finding work has been difficult because most of the places she has applied have either nuts or nut products in their plants. She must read the label on everything to make sure it does not contain nuts. She has had as many as 4 reactions a week. Claimant testified that she had daily contact with nuts and nut oil before the incident and had no reaction.

Claimant met with Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation, as a referral by her attorney, for an examination on January 15, 2009. Claimant presented with chief complaints of redness and itching of the face and neck; swelling of the lips; dizziness; chest tightness; and nausea and vomiting. Claimant had facial puritis or hyperemia at the time of the examination, which indicates an excess amount of blood in the face. Dr. Murati reviewed claimant's medical records and, upon examination, opined that she had an allergic reaction to peanuts. Dr. Murati noted the RAST test performed by Dr. Baker was negative to peanuts.

Dr. Murati opined that the diagnosis, within all reasonable medical probability, was a direct result of the work-related injury on December 8, 2008. He recommended a full evaluation with an allergist, that claimant continue taking Benadryl as needed, and that claimant have access to an EpiPen at all times. For the facial puritis he recommended claimant use Cetaphil lotion. For restrictions he recommended claimant avoid peanuts or peanut products.

Dr. Murati met with claimant again on August 22, 2011, at which time claimant stated that the hyperemic rash on her face had resolved. She reported that she read all

food and shampoo labels and must be careful what she eats to avoid an allergic reaction. Claimant carried an EpiPen with her at all times. Dr. Murati again opined that claimant had an allergy to peanuts. Claimant was unable to find employment that had no exposure to peanuts or nuts and lacked the schooling for any other jobs.

Dr. Murati opined that claimant's nut and peanut allergy is, within reasonable medical probability, a direct result of the work-related injury on December 8, 2008. Dr. Murati was of the mistaken opinion that claimant was sprayed with peanut oil on December 8, 2008, which was actually claimant's last day of work with respondent. He was not provided an opportunity to test the actual substance which was sprayed into claimant's face. He was not provided information as to the level of concentration of the oil and did not know how long the oil was on claimant's face. He was not informed whether claimant wore gloves or a mask and did not know how often claimant was exposed to nuts or their dust or whether either ever touched claimant's skin. Dr. Murati testified that he based his opinions on the conclusions reached by Dr. Martinez.⁵

Dr. Murati assigned claimant a 5 percent whole person functional impairment, based on the 4th edition of the *AMA Guides*, citing page 280, table 2 which deals with skin disorders. However, on cross examination, Dr. Murati acknowledged the *Guides* do not talk about allergies. Dr. Murati reviewed the task list of vocational expert Karen Terrill and opined claimant could no longer perform 15 out of 34 tasks for a 44 percent task loss.

Claimant met with John D. Martinez, M.D., at the KU Medical Center, for a determination of whether she is allergic to peanuts and if the problem is related to an event in the workplace. Dr. Martinez is board certified in internal medicine and allergy-immunology and rheumatology. The history provided to Dr. Martinez indicated claimant was sprayed in the face with metrin oil and within 20-30 minutes developed an itchy red rash over her face, arms and legs, had chest tightness with lip swelling, throat swelling, difficulty swallowing and vomiting.

Extensive skin testing for a multitude of common aeroallergens, performed by Daniel J. Stechschulte, M.D., at the KU Medical Center, was reported as negative or normal, except for a slight reaction to saline. An ImmunoCAP IgE test was negative to milk, wheat, corn, peanut, soybean and egg mix. Claimant's pulmonary function testing was also normal. Dr. Martinez opined that, based on skin testing and outside blood testing there was no clear allergen trigger and no clear food hypersensitivity reaction.⁶

⁵ Murati Depo. at 30.

⁶ While many of the tests performed on claimant were done by or under the supervision of Dr. Stechschulte, he was not deposed, as, at the time of Dr. Martinez's deposition, Dr. Stechschulte was deceased.

Dr. Martinez's formal diagnosis for claimant, based on claimant's history, was angioedema and urticaria. He concluded that the allergic reaction was triggered by the ingestion of certain foods, particularly peanut products. No official testing was done for an allergy to metrin oil as there is no test for oil allergies. The allergy would actually be to proteins in the oil. Dr. Martinez opined that claimant should avoid exposure and carry an EpiPen with her at all times. Dr. Martinez opined that claimant had a peanut allergy and that there was no treatment for a food related allergy.

In his letter of July 16, 2009, Dr. Stechschulte expressed an alternative explanation for claimant's symptoms. He noted elevated serum tryptase and liver enzymes which raises the possibility of mastocytosis. This is either a primary or an acquired disease unrelated to environmental exposure. Further work up for liver disease was possibly indicated. He acknowledged metrin oil as a potential trigger for claimant's symptoms was speculative and the available data did not identify an allergic reaction to the suspected nuts to which claimant was exposed in the factory.⁷

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2008 Supp. 44-508(g) states:

(g) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

The Award provides a detailed and accurate analysis of the ALJ's Conclusions of Law. The Board adopts that analysis in toto as its own. The Board finds it persuasive that none of the physicians who examined and/or treated claimant was ever able to document a physical reaction to claimant's alleged allergic reaction to nuts, nut products or peanuts. Additionally, no physician related claimant's current problems to the 2006 exposure to

⁷ Martinez Depo., Ex. 3.

metrin oil. In fact, whenever claimant was tested, the results to any exposure to metrin oil were normal.

It is true that several physicians who examined and/or treated claimant diagnosed an allergy to peanuts, nuts and nut produces, but all based their diagnosis on claimant's history. None was able to make that diagnosis based upon an established allergy reaction or any physical findings.

K.S.A. 2008 Supp. 44-508(e) states:

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

Claimant argues that physical findings of an allergic reaction are not necessary under the "injury" definition in the Act. While this is technically true, there needs to be some evidence that this allergy actually exists. This record, absent claimant's allegations, contains no such evidence. Even Dr. Murati, claimant's hired expert was unable to identify physical evidence of an allergy, except for the initial finding of "facial puritis", which finding was absent at the later exam. He also failed to relate this "rash" to claimant's workplace exposure. Additionally, this rash was not identified by any other health care provider, and was not identified by Dr. Murati until several weeks after claimant ceased working for respondent.

Ultimately, it is the decision of the Board that claimant has failed to prove that she acquired an allergy to nuts, nut products or peanuts as the result of any exposure to those products while claimant was employed by respondent.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that she suffered personal injury by accident which arose out of and in the course of her employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated March 20, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge